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August 5, 2016

Jessie Laslovich
Chief Legal Counsel
Montana Commissioner of Securities and Insurance
840 Helena Ave.
Helena, MT 59601

Re: Draft Air Ambulance Legislation (August 3, 2016 version)

Dear Mr. Laslovich,

I write today on behalf of America's Health Insurance Plans (AHIP) to provide comments on the Montana Commissioner of Securities and Insurance's (CSI) draft legislation.

America's Health Insurance Plans (AHIP) is the national trade association representing the health insurance community. AHIP's members provide health and supplemental benefits through employer-sponsored coverage, the individual insurance market, and public programs such as Medicare and Medicaid. AHIP advocates for public policies that expand access to affordable health care coverage to all Americans through a competitive marketplace that fosters choice, quality, and innovation.

AHIP understands the important services that air ambulance transports provide to consumers on a daily basis. Consumers needing such services are at their most vulnerable and often times the ability to get a patient to a facility via air ambulance can make the difference in a critical care situation. However, there are several troubling aspects to the draft bill legislating areas of the provision of air ambulance services. AHIP is pleased the CSI and Air Ambulance Work Group recognizes the importance of holding consumers harmless for astronomical amounts associated with having received air ambulance services; however, there continues to be many areas of concern for health plans and the health system in general where these services are concerned.

The binding arbitration provisions are preempted by federal law.

While we appreciate this legislation's approach to protecting patients from egregious billing, we must point out that Sections 1 through 3 regarding health insurer reimbursement, binding arbitration, and judicial remedies are preempted by federal law, specifically the federal Airline Deregulation Act (ADA), which prohibits states from imposing any economic-related regulations on air carriers (i.e. any regulations that would impact an air carrier's rates, routes, and services).[1] The ADA has been widely interpreted by both the courts and federal agencies to preempt any state laws or regulations that either directly or indirectly impact such economic areas.

[1] *49 U.S.C. § 41713*

Court decisions and federal agency opinion letters proscribe state regulatory authority over many aspects of the air ambulance industry. Areas where federal authorities permit state regulation of air ambulances have been generally limited to medical and quality standards of care designed to serve a patient care objective. However even medical-based regulations may be preempted if enacted as a means of indirectly engaging in economic regulation. Federal courts and agencies, including the U.S. Department of Transportation and Federal Aviation Administration, have issued numerous opinions clarifying the scope and application of federal law on air ambulances and prevent states from regulating many aspects of the air ambulance industry, including:

- Certificates of need, public necessity, and convenience;
- Rates;
- Mandating universal availability of services provided under a carrier's subscription or membership service;
- Passenger/third party flight accident liability insurance requirements;
- 24/7 availability requirements;
- Pilot training;
- Limitations on geographic service areas; and
- Weather-minimum performance standards.

As drafted, this bill establishes the allowable reimbursement amounts that must be paid by an insurer: the billed charges of the air ambulance services, another amount negotiated with the air ambulance service, or the highest amount the insurer would pay to an in-network air ambulance service for the services performed. While we agree that these options serve the dual purpose of reimbursing the air ambulance provider for the services rendered while also holding the consumer harmless for egregious balance bills, we nonetheless believe that this payment scheme would be preempted by the ADA.

The law also allows the insurer and air ambulance service to dispute those amounts through a binding independent dispute resolution process and tasks the independent reviewer with determining the "usual, customary and reasonable value" [2] of an air ambulance provider's disputed "services." It permits the reviewer to consider all manner of economic metrics related to an air carrier's business (i.e. fees the carrier usually charges and accepts, fees other carriers usually charge and accept, the composition of a carrier's service personnel) as well as any other factor the reviewer deems "relevant." In short, the reviewer is expected to rely upon all of the same economic metrics that the air ambulance industry itself would normally consider when

[2] We presume that this term is used in place of the more common "usual, customary and reasonable *rate*" to avoid explicitly using the term "rate" in an effort to circumvent express federal preemption of state laws impacting air carrier rates. It is worth noting that, from a textual standpoint, that the terms "value" and "rate" are synonyms and we do not believe that this construct would survive judicial scrutiny.

setting a rate or price. Together, this effectively amounts to rate setting, but by another means and called by another name, and is likely a form of economic regulation preempted by the ADA.

Furthermore, under the draft bill, not only would an independent reviewer be setting an air ambulance carrier's reimbursable "rate" on an individual claim basis, but a reviewer could also presumably (because they are allowed to consider any other factors they deem relevant) draw upon findings made in similar but separate dispute resolution proceedings to arrive at an average standard reimbursement rate. That average rate could then presumably be relied upon and applied indefinitely in future cases. Compounding the issue is the draft bill's lack of express instructions to the reviewer on how much weight to assign to any of the factors they consider when arriving at a usual and customary rate. The result under either scenario is the same – independent reviewers are effectively setting the reimbursement rate for air ambulance services as directed and required by state law.

We believe that any judicial remedy which may be sought by an aggrieved party in a court of competent jurisdiction (as allowed by this bill) would be preempted under the same grounds as the independent review process.

The CSI should refrain from introducing this legislation until federal action is taken.

We believe that taking action on this issue through the proposed legislation is premature, given the current climate at the federal and nationwide level. This year, Senator Tester proposed two amendments to the Internal Revenue Code that would require the Government Accountability Office to conduct a study on the price of air ambulance services and that would amend the federal Airline Deregulation Act to allow states to regulate air ambulance services by establishing primary and secondary call lists, predicated on participation in health insurance provider networks in the states, and participation in mediation for reimbursement of out-of-network emergency services.[3] The GAO study requirement was successfully added to the 2017 Labor, Health and Human Services, and Education Appropriations Bill,[4] which was approved by the Senate Appropriations Committee. It is awaiting a vote in the full Senate.

The NAIC, NCSL, and NCOIL have all acknowledged the preemption challenges that states are facing when addressing this issue and are actively seeking solutions at the federal level. We encourage the CSI to refrain from introducing a bill, especially one this damaging to one stakeholder in the health care system, until federal solutions can be sought to allow more comprehensive legislation to be adopted. AHIP and its members support the action on the

[3] "Tester Stands Up for Consumers, Tackles Increasing Medical Costs." April 7, 2016. Available online at https://www.tester.senate.gov/?p=press_release&id=4473.
[4] Senate Report 114-274, accompanying S.3040. June 9, 2016. Available online at https://www.congress.gov/congressional-report/114th-congress/senate-report/274.

federal level and hope that states will soon have appropriate authority to review and propose the needed consumer protections and price transparency for these services

This legislation does nothing to address or hold down the costs of air ambulance services.

This bill provides no incentive for the air ambulance industry to keep costs down. Although the bill takes the important step of holding the consumer harmless for billed charges, it does not solve the problem of the astronomical bills themselves, and only serves to shift the responsibilities of those costs to insurers. The bill as written will require costs, without limits, to be the responsibility of the insurer without providing a mechanism for the air ambulance stakeholders to share in the accountability of the cost.

Until such time as there is a federal solution, we believe that the goal of the CSI should be to encourage plans and air ambulance providers to enter into mutually beneficial contracts. Health plans develop provider networks that offer consumers and employers access to affordable, high-quality care, including access to air ambulance services. Health plan networks have long been demonstrated as an effective means of containing costs and limiting patient out-of-pocket costs. When air ambulance providers contract with insurers, patients benefit. The draft legislation presents no incentive for air ambulance companies to contract with insurers and join already existing and robust insurer networks or otherwise undertake good faith efforts to negotiate more reasonable costs for such services. Any scenario which requires an insurer to pay all billed charges set by the provider further restricts the ability of the insurance industry to try to manage costs through contracting with this provider type. It also encourages contracting providers to remove themselves from an insurers' networks.

The air ambulance industry is characterized by inelastic pricing with no bearing on the overall demand for such services. Air ambulance providers are increasingly moving away from any responsible negotiated charges with insures and hospital-based contracts as a way to increase revenue and gouge the health care system as a whole. Billed charges are generally higher than the amount paid to providers under negotiated health plan contracts, Medicare, or Medicaid. An analysis provided by Montana's Air Ambulance Work Group found that the national average air ambulance charges ranged from 345% to 893% of Medicare allowable amount.[5] When compared to the data supplied by BCBS of Montana and Allegiance, the analysis showed that air ambulance charges in Montana are comparable to the rest of the country.

Compounding the problem is a corresponding lack of oversight or accountability on air ambulance providers to control costs or otherwise negotiate reasonable rates. You can see how no oversight and responsibility for provider charges is detrimental to the cost of the health care

[5] National Air Ambulance Charge Data. Available online at http://leg.mt.gov/content/Committees/Interim/2015-2016/Economic-Affairs/Committee-Topics/Ambulance/MT-final-CMS-charge-data.pdf.

system as whole, including health plans, and for patients in the form of increased cost sharing responsibilities.

AHIP believes establishing a system where the only attempt to address the issue of price gouging by air ambulance providers is on a per claim basis, whether in the form of a dispute resolution process or through judicial remedies (as this draft bill does) accomplishes nothing in addressing the fundamental issue of affordability, and a lack of any responsibility to the larger health care system as a whole.

We encourage the state to take action on price transparency and consumer protections.

With obstacles such as federal preemption, AHIP recognizes that states may have limited options with respect to how to address escalating costs for patients. However, we encourage the CSI to consider the following solutions to protect consumers.

AHIP believes that the CSI should consider focusing its legislative activity on requiring price transparency for air ambulance companies that explicitly detail the costs incurred by patients. Increased cost transparency for air ambulance providers would not only better enable health plans and their enrollees understand the associated costs of such services, but would also benefit hospitals and consumers who deserve to know what the actual cost drivers are behind the exorbitant bills they receive from such providers.

Any such cost transparency requirements would be consistent with the transparency obligations expected of air carriers by the FAA for other services they perform, such as disclosure of certain ticketing fees and fuel surcharges in the air passenger industry. In addition, there is a large gap between what a flight costs and what is ultimately billed to the consumer. At a minimum, bills should include detailed line items for medical services, fuel costs, and other costs and fees.

The state should also actively engage first responders, law enforcement, and dispatchers on the proper circumstances to dispatch an air ambulance as part of their continuing education requirements. Emergency service personnel should be encouraged to update or amend their protocols on a regular basis, utilizing ground ambulances when possible. Such services are a vital part of delivering care, often cost less than air ambulances, and are more readily available.

We continue to engage in discussions with other stakeholders regarding solutions and strategies that states may deploy to ensure vital emergency transportation services, while balancing the cost impact that such services may have on patients and the health care system. We look forward to continued discussions with you on this important issue. If you have any questions, please do not hesitate to contact me at gcampbell@ahip.org (202-679-6522).

Sincerely,

Grace Campbell
Regional Director